82-1501

No. ——

Office Supreme Court, U.S.

MAR 10 1983

ALEXANDER L STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMALIA MUSICO,

Petitioner,

v.

Francis G. Musico, Jr., individually and as Personal Representative of the Estate of Francis G. Musico, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOURTH DISTRICT, FLORIDA

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QUESTION PRESENTED

Is it a denial of full faith and credit for the courts of Florida to give effect to a waiver of marital rights in a prenuptial agreement made in New York, where the waiver is indisputably invalid under the statutes of New York, as construed by the highest court of that state?

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Supreme Court of the United States

OCTOBER TERM, 1982

No. ———

AMALIA MUSICO.

Petitioner,

v.

Francis G. Musico, Jr.,* individually and as Personal Representative of the Estate of Francis G. Musico, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOURTH DISTRICT, FLORIDA

AMALIA MUSICO petitions for a writ of certiorari to review the decision of the District Court of Appeal, Fourth District, Florida, in this case.

OPINIONS BELOW

The opinion of the district court of appeal (App. A 1a) is reported at 422 So.2d 31 (Fla. 4th DCA 1982). The opinion of the trial court (App. B 3a) is not reported.

^{*} There are no additional parties in this proceeding.

JURISDICTION

The Florida district court of appeal entered its decision on September 8, 1982. Petitioner timely petitioned for rehearing (App. D 8a) on September 23, 1982, which the court denied (App. E 15a) on December 10, 1982, at which time the judgment became final. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 4, § 1 of the United States Constitution provides in pertinent part:

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.

- 2. New York Estates, Powers & Trusts Law § 18-e (1966) provides in pertinent part:
 - 1. Either spouse, during the lifetime of the other, may waive or release a right of election authorized by Section eighteen or Section eighteen-b against a particular last will or testamentary provision described in Section eighteen-a of this chapter, or any last will of the other spouse, whether such will was executed before, on or after September first, nineteen hundred sixty-six. A waiver or release of all rights in the estate of the other spouse is a waiver or release of the right of election as against any last will, or any testamentary provisions described in section eighteen-a of this chapter.
 - 2. To be effective, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.
 - 3. Such a waiver or release is effective, in accordance with its terms, whether
 - (a) executed before or after the marriage of the spouses;

- (b) executed before, on or after September first, nineteen hundred sixty-six;
- (c) unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses;
 - (d) executed with or without consideration;
 - (e) absolute or conditional.

3. New York Real Prop. Law § 292 states:

Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

STATEMENT OF THE CASE

This case arose out of a dispute over a prenuptial agreement (App. F 16a). It was signed by petitioner AMALIA MUSICO ("petitioner") three weeks before her marriage to Francis G. Musico, deceased, whose attorney drafted the document and supervised her signing in his New York office. By its terms, the agreement is "made under and . . . governed by the laws of the State of New York" (App. F 20a). The marriage lasted from December of 1966 until Mr. Musico's death in New York City in January of 1980. The agreement gave her nothing during his lifetime or at his death.

FRANCIS G. MUSICO, JR. ("respondent"), as personal representative of the estate of his late father, instituted probate proceedings in the Circuit Court of Broward County, Florida. Since Mr. Musico's will did not mention his widow, she filed a petition to recover her pretermitted widow's statutory share of his estate. Respondent interposed the prenuptial agreement as a complete bar to recovery.

On January 20, 1981, petitioner filed a motion for summary final judgment as to her entire case, arguing that the agreement was void and of no effect because it was not executed in accordance with the strict requirements of New York law, which required any waiver or release of a right of election to be acknowledged or proved. The trial court denied the motion (App. C 6a, 7a) and the case proceeded to trial. There it was not disputed that the agreement was drafted solely by the husband's personal attorney, Nathan Dinkes, Esq., and that it was not properly executed under New York law before the husband died. The trial court nevertheless denied all relief, holding that an affidavit signed by Dinkes after Musico's death cured the execution defect (App. B 4a).

On July 31, 1981, an appeal was filed in the District Court of Appeal, Fourth District, Florida. On September 8, 1982, that court affirmed the trial court decision. With respect to the defect in execution referred to by petitioner, the appellate court dismissed her argument stating—and thereby raising the point for the first time—that the defect was merely "procedural":

Moreover, we conclude that appellant's allegations of procedural irregularities in the execution of the agreement are without merit.

[422 So.2d at 32 (App. A 2a).]

Petitioner requested rehearing on September 23, 1982 (App. D 8a), and contended in the third paragraph of her petition for rehearing:

... The significance of *In re Warren's Estate*, 229 N.Y.S.2d 1004 aff'd. 236 N.Y.S.2d 628, 187 N.E.2d 478 (N.Y. 1962), has been overlooked. The court in *Warren* held that property rights vest as of the date of death. Therefore, in order for a waiver of marital rights to be effective to bar the election rights of a surviving spouse, it must satisfy the formalities

of execution *prior* to the date of the deceased spouse's death... At best, failure to recognize *Warren* as controlling would be violative of Article IV, Section One of the United States Constitution requiring "full faith and credit" to be given to judicial proceedings of our sister states [App. D 8a].

On December 10, 1982, the court denied the rehearing petition and the judgment became final on that date (App. E 15a).

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(3) to review the decision of the District Court of Appeal, Fourth District, Florida, the state court of last resort. Petitioner did not pursue proceedings in the Florida Supreme Court because that court has no jurisdiction to review this case under the Florida constitution and appellate rules promulgated thereunder (See App. G 21a). Thus, the District Court of Appeal, Fourth District, Florida, is the highest court of Florida in which a decision could be had in this case.¹

STAGE AT WHICH FEDERAL QUESTION WAS RAISED AND PRESERVED

At trial, petitioner and respondent agreed by written stipulation that New York law governed the substantive rights of the parties, as the agreement itself provided. In construing the effect of the agreement the trial court correctly determined that New York law applied, but

¹ The only basis for seeking review in the Florida Supreme Court would be that the decision on its face was "expressly and directly" in conflict with another Florida appellate decision. Because the face of the decision disclosed no conflict, petitioner invited the court to acknowledge an express and direct conflict with other Florida appellate decisions. The court declined to acknowledge any such conflict and denied the petition for rehearing without further opinion (App. E 15a).

misconstrued the controlling substantive principles. Thus, an appeal was taken on the basis of the misapplication of New York law. Despite the pre-trial stipulation of the parties and the application of New York law by the trial court (albeit a misapplication of New York law), the Florida appellate court ruled, citing primarily Florida law and never mentioning the New York statute governing waivers of marital rights, that the execution requirements were merely "procedural" (App. A 2a). Thus, the full faith and credit issue was raised for the first time in the Florida appellate court's decision. A petition for rehearing was then filed in which the denial of full faith and credit was challenged (App. D 13a). The petition was denied without opinion (App. E 15a).

REASONS FOR GRANTING PETITION

Introductory Statement

This case presents an important question, the resolution of which is necessary to preserve the integrity of the "full faith and credit" clause of the United States Constitution. It involves the refusal of a Florida appellate court-despite controlling legal principles, the express wording of the agreement in issue, and the stipulation of the parties-to recognize and apply New York law regarding the formal execution requirements for a waiver or release of a marital right of election. This case presents an example of what occurs when the courts of one state fail to recognize substantive rights created by the laws of a married couple's state of origin. The importance of granting certiorari in this case is underscored by the fact that our population has become migratory and marital contracts have become commonplace. It is submitted that when the facts of this case are reviewed in the context of the controlling law, the importance of granting the petition will be evident.

I. THE WAIVER OF MARITAL RIGHTS AT ISSUE IN THIS CASE IS INDISPUTABLY INVALID UNDER THE STATUTORY LAW OF NEW YORK, AS CONSTRUED BY THE HIGHEST COURT OF THAT STATE.

The statutory law of New York sets forth the manner of execution of any agreement which may have the effect of waiving marital rights. The statute governing execution of the Musico agreement is N.Y. Estates Powers & Trusts Law § 18-e.² It states in pertinent part:

2. To be effective, a waiver or release [of a marital right of election] must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

Thus, any waiver or release of marital rights is void unless it is executed in the manner required by New York law for the recording of a conveyance of real property. In Re McGlone's Will, 284 N.Y. 527, 32 N.E.2d 539 (N.Y. 1940), aff'd, 314 U.S. 556 (1941).

The New York statute prescribing the acknowledgment or proof required for the recording of a conveyance of real property is N.Y. Real Prop. Law § 292. It states in pertinent part:

. . . [S]uch acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

As the statute itself provided, an "acknowledgment" is the required formal confirmation made by the parties

² This was the statute in effect in December of 1966 when petitioner signed the Musico prenuptial agreement. It imposed the same basic restrictions as the current statute, N.Y. Est. Powers & Trusts Law § 5-1.1(f).

signing the instrument under oath that they executed it. In New York this fact must be evidenced by a written certificate of an officer authorized to administer oaths in that state. Cicerale v. Cicerale, 85 Misc.2d 1071, 382 N.Y.S.2d 430, aff'd, 387 N.Y.S.2d 1022 (N.Y. App. Div. 1976). A "proof" is the confirmation by a subscribing witness that the parties signed it. This must also be made under oath in strict compliance with the statute. Id. To be effective, an acknowledgment or proof must be made during the lifetime of the deceased spouse. In re Warren's Estate, 299 N.Y.S.2d 1004, aff'd, 236 N.Y.S.2d 628, 187 N.E.2d 478 (N.Y. 1962).

Since the waiver in this case was neither acknowledged nor proved prior to the death of Mr. Musico, the waiver is void under New York law.

Although it acknowledged the applicability of New York law, the trial court nevertheless held that the defect in execution was cured by an affidavit of Mr. Musico's attorney, executed after Mr. Musico's death. This obvious misinterpretation of New York law was appealed on the basis of *Warren*.

The Warren decision leaves no doubt that under New York law property rights vest at the date of death, Irving Trust Co. v. Day, 314 U.S. 556 (1942), and that a failure to acknowledge or prove a marital contract prior to a spouse's death is not curable thereafter. In Warren, a husband and wife entered a separation agreement containing a mutual waiver of the right of election similar to the one now before this Court. After the husband's death. the widow sought to elect against her husband's will on the grounds that the waiver of her right of election was ineffective because it was neither acknowledged nor proved. The trial court ruled that the waiver of the right of election was ineffective because it had not been acknowledged or proved during the husband's lifetime. The decision was affirmed by the New York Supreme Court and again by the New York Court of Appeals.

Warren was expressly applied by the New York Supreme Court in the case of In re Held's Estate, 24 A.D.2d 506, 261 N.Y.S.2d 674 (1965). Citing Warren, the New York Supreme Court unanimously held that an agreement waiving a spouse's right of election was invalid because it was not acknowledged until after the decedent's death. It stated:

The separation agreement . . . which contained a waiver and release of each party's right of election against the estate of the other, was not acknowledged or proved in the manner required for the recording of a conveyance of real property . . . The admission by the surviving spouse that he had signed the agreement was made after the testatrix' death; and such admission therefore does not constitute an acknowledgment within the meaning of the statute. (Decedent Estate Law, § 18; Matter of Warren's Estate...)

Since the separation agreement had not been acknowledged prior to the testatrix' death, and since the 'question of whether a surviving spouse has a right to elect to take against the deceased spouse's will should be tested as of the time of the decedent's death' (Matter of Warren's Estate, supra) it follows that there was no proper waiver of the right of election and that the notice of election here was valid.

[261 N.Y.S.2d at 675.]

Not a single appellate decision since Warren suggests even the slightest doubt as to the controlling effect of Warren. See, e.g., In re Kucera, 73 Misc.2d 456, 342 N.Y.S.2d 812 (1973); see also, In re Howland's Will, 284 A.D. 4th 306, 132 N.Y.S.2d 451 (1954) (holding that the statute requires acknowledgment during the lifetime of the spouse and failure to do so voids the agreement).

Because the statutory element of proof was never satisfied in this case, the Musico agreement is absolutely void.

As stated in *Warren*, such a result generates an increased respect for the strong public purpose which the strict execution requirements implement. 229 N.Y.S.2d at 1006.

The New York statute and the Warren decision and its progeny were presented to the appellate court by petitioner as the only appropriate basis for decision. Respondent did not contend that any law other than the law of the state of New York controlled the formalities of execution. Surprisingly, however, the appellate court held for respondent without referring either to the New York statute or the Warren decision. Instead, the appellate court relied principally on Florida decisions as it dismissed the defect in execution of the waiver as a mere "procedural" irregularity. On petition for rehearing, petitioner argued that the appellate court's failure to apply New York law, as enunciated in Warren, constituted a denial of full faith and credit. The petition for rehearing was denied.

II. THE FULL FAITH AND CREDIT CLAUSE PROHIBITS FLORIDA COURTS FROM GIVING EFFECT TO A WAIVER OF MARITAL RIGHTS EXECUTED IN NEW YORK WHEN THAT WAIVER IS INVALID UNDER THE LAWS OF THE STATE OF NEW YORK.

The refusal of the Florida appellate court to apply New York law, as enunciated in Warren, to the waiver of marital rights constitutes a denial of full faith and credit. John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936). In John Hancock, this Court recognized that a state statute governing validity of a contract becomes such an integral part of that contract that the full faith and credit clause compels a sister state to recognize the statute as part of the contract itself.

The John Hancock case involved a life insurance policy applied for, issued and delivered in New York, where the decedent and his widow resided until his death. After

the decedent's death she moved to Georgia and sued on the policy in state court. The insuror contended that New York law controlled, and denied liability because of false material representations in the policy application. It was undisputed that the application contained false statements and that under New York statutory law, as construed and applied by the courts of New York, the policy was void.

The Georgia trial court overruled the company's contention and permitted the widow to testify that true oral statements had been given regarding the deceased's application information. The jury found for the widow and the Supreme Court of Georgia affirmed. In so doing, the Georgia Supreme Court reasoned that while the validity, form, and effect of a contract are to be determined by the law of the place where the contract is made, the character and extent of remedies and the mode of procedure are to be determined by the law of the forum.3 The Court then held that the manner and effect of the oral disclosure affected the remedy only, and not validity of the agreement. On this basis, the Georgia Supreme Court concluded that full faith and credit did not require application of New York law, 299 U.S. at 180-81. This Court reversed. It held:

The reasoning of the Georgia Court, and the conclusion reached by it, are not sound. No question of remedy is presented. The Company sets up as a defense a substantive right conferred by a statute of New York... To sustain the defense involves merely recognition by the courts of Georgia that the parties have by their contract made in New York subjected themselves to certain conditions prescribed by its statute... The statute of New York prescribes, or

³ So far as it goes, this remains a correct statement of the law. In Scudder v. Union National Bank, 91 U.S. 406 (1876), this Court determined with respect to contracts executed in one state to be given effect in another that (1) matters bearing upon execution, interpretation, and validity are to be determined by the law of the place where the contract is made, and (2) matters relating to procedure depend upon the law of the forum state.

limits, the things which will be effective to create binding contracts. . . , or terms in them. As construed by the highest court of the State, the statute makes the policy with the application annexed the entire contract between the parties. . .

[299 U.S. at 182.]

The Court acknowledged:

In so declaring, the statute enacts a rule of substantive law which became a term of the contract. . .

[Id.]

Like the statute in issue in John Hancock, the execution statute regarding the strict formalities to be followed in waiving marital rights became an integral part of the Musico agreement and thereby created substantive rights protected by the full faith and credit clause. Moreover, the prenuptial agreement itself states that New York law governs the substantive rights of the parties (App. F, infra). Nevertheless, the Florida appellate court improperly characterized the statutory execution requirement as procedural and denied relief. This holding is directly contrary to the New York Supreme Court's characterization of the statutes in Warren, which underscores the sound public purpose of the execution requirement. As stated in Warren:

It is not novel in the law, however, to find a harsh result where statute or public interest requires strict and full compliance with certain formalities before rights may be predicated. By pertinent statutes, some agreements require a writing, wills require witnesses for enforceability, and contracts fully documented and freely made are set aside for usury. In many instances injustice may result from adherence to the statutes; but the applicable statutory requirements of formality were founded on a sound public purpose, and the harshness which sometimes ensues generates increased respect for such statutory requirements and the public purpose which they implement.

The statute here does not use the device of the acknowledgment as merely an easy way of proof, as in the case of a deed or a mortgage. Instruments of that kind are good as against the parties thereto and are enforceable against all who know of them, whether acknowledged or not. But in the case of the waiver of the right of election, it is invalid and of no effect against anyone without the acknowledgment.

[229 N.Y.S.2d at 1006-7, (emphasis added)]

As in John Hancock, the state court has denied full faith and credit to the New York statute on the erroneous ground that the statute does not confer substantive rights. Under the authority of John Hancock, therefore, the Florida appellate court's holding constitutes a denial of full faith and credit. Bradford Electric Light Co., Inc. v. Clapper, 286 U.S. 145 (1932); accord, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

III. CERTIORARI IS NECESSARY TO ENSURE PROTECTION OF SUBSTANTIVE RIGHTS OF MIGRATING CITIZENS.

The Florida appellate court's refusal to follow the controlling law of New York regarding execution of the agreement does not involve a mere "procedural" irregularity as characterized by that court in its decision Musico v. Musico, 422 So.2d 31 (Fla. 4th DCA 1982), but instead constitutes a denial of an important substantive right, conferred by a New York statute, as construed by the highest court of that state. Migration of citizens between and among sister states today is commonplace, and this is especially so in the sunbelt area. Expanding populations of persons, firms, and corporations frequently bring to their new locale rights that are predicated and governed by statutes and judicial decisions of the highest courts of their states of origin. Nowhere is this phenomenon more evident than among the rapidly migrating population moving from New York to Florida, and perhaps nowhere is it more important to recognize than with respect to the rights of spouses and family members. Indeed, marital agreements are a coming trend, increasing in fashion and creating a prolific number of problems of their own when parties who have migrated from one state to another agree on a choice of law governing their substantive rights.

This Court's holding in *John Hancock* dictates that the Florida appellate court's refusal to follow controlling New York substantive law in this case is a denial of full faith and credit, and it is submitted that this clearly erroneous refusal requires judicial resolution to assure uniform and just application of constitutionally preserved rights.

CONCLUSION

The full faith and credit clause of United States Constitution requires the courts of Florida to recognize petitioner's substantive right under the New York statute governing waivers of marital rights, and to uphold that statute in the same manner as it has been upheld in New York by the highest court of that state. Petitioner's rightful claim to the protection of New York law has been denied by the Florida appellate court, and can now be preserved only by this Court. This Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the District Court of Appeal

DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

No. 81-1410

Amalia Musico, Appellant/Cross-Appellee,

V.

Francis G. Musico, Jr., individually and as Personal Representative of the Estate of Francis G. Musico, deceased,

Appellee/Cross-Appellant.

Sept. 8, 1982

Rehearing Denied Dec. 10, 1982

John R. Hargrove of McCune, Hiaasen, Crum, Ferris & Gardner, P.A., Fort Lauderdale, for appellant/cross-appellee.

James O. Murphy, Jr., and Douglas K. Silvis of English, McCaughan & O'Bryan, Fort Lauderdale, for appellee/cross-appellant.

PER CURIAM.

This appeal emanates from a probate proceeding in which appellant/surviving spouse contested the validity of an antenupital agreement executed in New York. The trial court upheld the agreement, finding that appellant had entered into the agreement knowingly, aware of its meaning and significance, and without duress. Although

the testimony on this issue was in conflict, the trial court's findings are supported by substantial competent evidence. Moreover, we conclude that appellant's allegations of procedural irregularities in the execution of the agreement are without merit. See Weintraub v. Weintraub, 417 So.2d 629 (1982); Flagship National Bank of Miami v. King, 418 So.2d 275 (Fla. 3d DCA, 1982); Estate of Garcia v. Garcia, 399 So.2d 486 (Fla. 3d DCA), petition for review denied, 407 So.2d 1103 (Fla.1981); In re Stegman's Estate, 42 Misc.2d 273, 247 N.Y.S.2d 727 (Surr.Ct.1964); In re Maul's Will, 176 Misc. 170, 26 N.Y.S.2d 847 (Surr. Ct.), aff'd with opinion, 262 A.D. 941, 29 N.Y.S.2d 429 (App.Div.1941), aff'd without opinion, 287 N.Y. 694, 39 N.E.2d 301 (1942).

Accordingly, the judgment is affirmed.

BERANEK, HURLEY and WALDEN, JJ., concur.

APPENDIX B Opinion of the Trial Court

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT OF FLORIDA IN AND FOR BROWARD COUNTY

Probate #80-0724

IN RE: ESTATE OF FRANCIS G. MUSICO, Deceased.

JUDGMENT

THIS CAUSE came on for final hearing with the primary issue being the validity or invalidity of a prenuptial agreement between the deceased, FRANCIS G. MUSICO, and his surviving widow, AMALIA MUSICO, petitioner, and the court having considered the evidence, argument of very able counsel and the law, does find:

- 1. That this court's comments on the applicable law set forth in its March 27, 1981 order on summary judgment and judgment on the pleadings is still appropriate and herein adopted by reference. (Petitioner attaches this March 27, 1981 Order of the Trial Court in Appendix "C").
- 2. That contrary to petitioner's assertions herein, Florida Statute 689.01 relative to conveyance is not relevant. This cause is in probate and same must be governed by Florida Statute 732.702.
- 3. That the petitioner, presently 52 years of age, a college graduate and 37 years of age at the time of executing the prenuptial agreement (3 weeks before the marriage herein) entered into said agreement knowingly; that she was fully aware of the meaning and significance

of the agreement; that there was no duress; and that petitioner's complaints about the agreement during the marriage seem to fortify the conclusion that she understood the provisions of the agreement when she executed it.

- 4. The proof herein is lacking of any fraud or overreaching. The decedent did not misrepresent his assets or the nature of his holdings nor did he conceal any information; there is no evidence that he failed to particularize his assets and liabilities in order to deceive petitioner. The history and approximate one-year relationship between decedent and petitioner prior to marriage demonstrates that petitioner was aware of the fact that decedent was a successful business man close to a millionaire status.
- 5. It is not within the province of this court to consider the wisdom of petitioner in executing said agreement nor of the deceased likewise waiving any right to petitioner's estate. The fact that the assets of petitioner and the deceased were disproportionate at the time of the execution of the agreement and that the provisions therein for petitioner were inadequate are not alone sufficient to invalidate the agreement. Both under New York and Florida law consideration is not required to have a valid agreement, which agreement the court hereby declares as valid and a waiver of all rights in the estate.
- 6. Petitioner's claim that the law of New York was not complied with as to the technical requirements relative to a subscribing witness is without merit as afteracknowledgement of an original subscribing witness is provided for by case law regarding prenuptial agreements. Therefore, it is

ORDERED and ADJUDGED that petitioner, AMALIA HORACEK MUSICO, take nothing herein either against FRANCIS G. MUSICO, JR., individually or as personal representative of the estate of FRANCIS G. MUSICO,

deceased, as her petitions for pretermitted spouse status and to set aside homestead real estate are denied.

DONE and ORDERED this 20th day of July, 1981.

/s/ W. Clayton Johnson Circuit Judge

Copy furnished counsel: John Hargrove Douglas K. Silvas

APPENDIX C

Trial Court's Order Denying Petitioner's Motions for Summary Judgment

OF THE 17th JUDICIAL CIRCUIT OF FLORIDA IN AND FOR BROWARD COUNTY

80 0724 Johnson

IN RE: ESTATE OF FRANCIS G. MUSICO, Deceased.

ORDER DENYING PETITIONER'S
MOTION FOR SUMMARY JUDGMENT
AND JUDGMENT ON THE PLEADINGS;
AND RESPONDENT'S MOTION FOR
RECONSIDERATION OR REHEARING
ON PARTIAL SUMMARY JUDGMENT

This cause came on to be heard on February 12, 1981, upon petitioner-wife's motions for summary judgment as to the validity of the execution and acknowledgment of a prenuptial agreement; and on petitioner-wife's motion for judgment on the pleadings as to homestead property; and on respondent-personal representative's motion for reconsideration of this court's prior ruling on respondent's motion for partial summary judgment as to the applicability of the "Dead-man's Statute". Having examined the pleadings and being otherwise fully advised in the premises, it is

1. ORDERED AND ADJUDGED that petitioner-wife's motion for summary judgment as to the validity of execution of the prenuptial agreement is hereby denied on the basis of In re: Stegman's Estate, 247 NYS 2d 727; and In re: Maul's Estate, 29 NYS 2d 429, 39 NE 2d 301, both of which speak to prenuptial agreements while petitioner's cases, Warren's Estate and Held's Estate, speak only to postnuptial separation agreements.

It is further recognized by this court that the New York statutes cited by petitioner are apparently applicable to only postnuptial agreements; and it is further

- 2. ORDERED AND ADJUDGED that petitioner-wife's motion for judgment on the pleadings as to homestead property is hereby denied on the basis of FSA § 732.702 which appears to eliminate the requirement of two subscribing witnesses and which clearly states that "waiver of 'all rights' or equivalent language . . . is a waiver of all rights to . . . homestead . . . by each spouse . . ." FSA § 732.702(1) (1979). This court further considers the recent cases of Ford v. Barnes, 366 So.2d 1235 (1979); Moxley v. Wickes, 356 So.2d 839 (1977); and Carrol v. Doughterty, 355 So.2d 843 (1978) which, although they relax the acknowledgment requirements as to conveyances, must surely apply to waivers as well as the parties are relinquishing greater rights in a conveyance than a waiver; and it is further
- 3. ORDERED AND ADJUDGED that respondent's motion for reconsideration on the applicability of the "Dead-man's Statute" is hereby denied for those reasons aforementioned in this court's previous order dated February 3, 1981 denying such motion. Petitioner-wife clearly falls within the exception enunciated in FSA § 90.602(2) and Briscoe v. Florida National Bank of Miami, Case No. 80-1048 (Feb. 17, 1981).

DONE AND ORDERED this 27th day of March, 1981.

/s/ W. Clayton Johnson Circuit Judge

Copy to:

Douglas K. Silvis John Hargrove Warren Rosmarin Stan Wakshlag Robert C. Maland

APPENDIX D Petition for Rehearing

IN THE DISTRICT COURT OF APPEAL FOURTH DISTRICT OF FLORIDA

Case No. 81-1410

Amalia Musico, Appellant/Cross-Appellee,

VS.

Francis G. Musico, Jr., individually and as Personal Representative of the Estate of Francis G. Musico, deceased,

Appellee/Cross-Appellant.

MOTION FOR REHEARING OR CLARIFICATION AND FOR REHEARING EN BANC

Pursuant to Rules 9.330 and 9.331 of the Florida Rules of Appellate Procedure, Appellant AMALIA MUSICO respectfully moves for rehearing or for clarification and for rehearing en banc of the decision rendered in this cause under date of September 8, 1982 for that said decision is contrary to Florida law and contrary to prior decisions of this Court. More particularly:

1. This case involves the upholding of a prenuptial agreement. Such agreements can only be upheld if they are the result of an "informed waiver" of marital rights. In this case the *only* evidence of record (including the evidence of the attorney who drafted the instrument) was to the effect that appellant's signature on the agreement was not a reflection of an informed and voluntary

act and that it would last only for one year. There was absolutely nothing presented to the contrary on these points. Lutgert v. Lutgert, 338 So.2d 1111 (Fla. 2 DCA 1976) is the law of Florida, and that case mandates that a presumption of overreaching must be applied under such circumstances.

Now, it is black letter law that the parties to an antenuptial agreement do not deal at arms length with each other. Their relationship is one of mutual trust and confidence. . . . Moreover, a presumption of undue influence or overreaching arises in transactions or contracts between persons in such a confidential relationship when it is clear that the dominant party thereto is the grossly disproportionate beneficiary of the transaction. . . .

The presumption which arises in these cases operates against the party receiving such benefit and imposes upon him the burden of coming forth with evidence sufficient to rebut it to the extent necessary to avoid its preponderating on the issue to which it relates.

The device of a presumption such as that we employ here is the prevalent judicial tool commonly used in the determination vel non of undue influence or overreaching in transactions arising out of confidential relationships.

The question here is not whether the wife knew what she was signing or what she was or was not getting. The agreement is clear on its face and she can't be heard to deny its contents. The question is whether she in the free exercise of her will, voluntarily signed it. (Emphasis added)

Id. at 115-16.

The per curiam decision directly conflicts with Lutgert. Had Lutgert properly been applied, appellee would have had the burden of coming forward with evidence showing that the agreement was fair. As it were, the presumption was not applied, the burden never shifted, and consequently no evidence was ever introduced (or was even required by the trial court) to establish the fairness of the agreement.

2. Since the undisputed facts of this case fall squarely within the setting of Lutgert, and further since Lutgert was not applied, the per curiam decision here is in direct conflict with the Court's recent decisions of Fleming v. Fleming, 408 So.2d 240 (Fla. 4th DCA 1982) and Baker v. Baker, 394 So.2d 465 (Fla. 4th DCA 1981). However, neither case has been cited by the Court. In Fleming the Court said:

On appeal, Mrs. Fleming contends that she was urged to make a determination quickly and without thought and was, in effect, coerced by Patterson [her own lawyer] to accept the third settlement offer. She suggests that Patterson was not prepared for trial and it was this unpreparedness which motivated him to urge her acceptance of the offer. More basically, she asserts that the trial court should have considered the fairness of the parties' settlement agreement before determining whether it should be rescinded or vacated.

The landmark case on this subject is, of course, *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 20-21 (Fla. 1962) where the court stated:

Ordinarily the burden of proof of the invalidity of a prenuptial contract is on the wife alleging it but if, on its face, the contract is unreasonable a presumption of concealment arises, the burden shifts and it is incumbent upon the husband to prove validity. (emphasis supplied)

This concept was reiterated and expanded on by this court in *Baker v. Baker*, 394 So.2d 465, 466-67 (Fla. 4th DCA 1981) . . .

Clearly, then, in a case where

Clearly, then, in a case where an agreement is alleged to be patently unfair, as here, the first order of business is for a court to make a determination as to whether the provisions made for a wife on the face of an agreement are, in the language of Del Vecchio, "disproportionate to the means of the husband." 143 So.2d at 20. If the agreement is found to be unreasonable on its face, the presumption that the husband concealed assets would arise and this, in turn, would shift the burden of proof to him to establish the validity of the agreement. Since, by the trial court's own admission, no determination as to the fairness of the agreement was made herein, we reverse and remand for consideration of this issue. (Emphasis added).

In Fleming, Judge Beranek, also a member of the panel in Musico, saw the "fairness" issue exactly. He said:

I concur specially to note that the former wife's contentions regarding duress were directed primarily at her own lawyer rather than at her former husband or opposing counsel. Despite this, the trial court erred in failing to consider the alleged facial unfairness of the settlement agreement . . .

Like Fleming, the Musico agreement is facially unfair because appellant receives nothing under its terms. Yet the Court failed to recognize this. Moreover, in this case appellant had no lawyer at all. The decision is therefore in direct conflict with Fleming.

In Baker, Judge Hurley, also a member of the panel in Musico, said:

While a marital relationship remains in a non-adversarial stance, each party has fiduciary-like responsibility to the other. As noted by the court in Del Vecchio v. Del Vecchio, supra, 143 So.2d at 21:

The relationship between the parties to an antenuptial [or postnuptial] agreement is one of mutual trust and confidence. Since they do not deal at arm's length they must exercise a high degree of good faith and candor in all matters bearing upon the contract.

The fact that Mrs. Baker was unrepresented by counsel, only underscores the necessity for full compliance with the fiduciary responsibilities inherent in the marital relationship. See Fuller v. Fuller, 68 So.2d 177 (Fla. 1953); Zakoor v. Zakoor, 240 So.2d 193 (Fla. 4th DCA 1970). (emphasis added)

Id. at 468

The decision is also in direct conflict with *Baker* since there was *no* evidence presented that Mr. Musico even tried to, much less succeeded at, fulfilling his "fiduciary like" responsibility to his wife.

3. The significance of In re Warren's Estate, 229 N.Y.S.2d 1004 (App.Div. 2d 1962) aff'd. 236 N.Y.S.2d 628 (N.Y. 1962), has been overlooked. The court in Warren held that property rights vest as of the date of death. Therefore, in order for a waiver of marital rights to be effective to bar the election rights of a surviving spouse, it must satisfy the formalities of execution prior to the date of the deceased spouse's death. This was not recognized in Maul (relied upon in the Court's opinion) because the point was never raised in that case. Discussion of the facts in Maul only incidentally discloses that the time of acknowledgment was after the death of the husband. Warren was decided twenty years after Maul, it considered and rejected Maul and is therefore the controlling law in New York on this point. At best, failure

to recognize *Warren* as controlling would be violative of Article IV, Section One of the United States Constitution requiring "full faith and credit" to be given to judicial proceedings of our sister states.

- 4. Regarding appellant's homestead argument, Florida Statutes, § 689.01 expressly proscribes the waiver or release of any interest in real property other than by instrument in writing and signed in the presence of two subscribing witnesses. In order to affirm in this case, Kyle v. Kyle, 128 So.2d 427 (Fla. 2d DCA, 1961), aff'd 139 So.2d 885, must have been overlooked or it has to have been tacitly overruled without mention. Appellant is at a total loss to understand the basis for the Court's ruling on this point since no reasoning for the affirmance on this ground has been stated, and neither statutes nor cases have been cited.
- 5. It is respectfully submitted that as to paragraphs three and four above, the flaws in execution are substantive defects, and not mere "procedural irregularities". This characterization by the Court is tantamount to saying that the requirement of two witnesses to a deed is merely procedural. That is not the law of Florida.
- 6. If the Court does not wish to rehear the case, then it is most respectfully requested that the opinion be clarified so that appellant can be afforded the opportunity to seek further review of the case in the Florida Supreme Court. Implicit in the Fourth District's affirmance is a holding which directly conflicts with Lutgert, Fleming, Baker and Kyle. The discretionary review of the Supreme Court can only be invoked under such circumstances, however, if the direct conflict also expressly sets forth the basis therefor. Thus, if rehearing is not granted, appellant is most hopeful that the Court will entertain this motion as being one for clarification and requests that it set forth specific reasons for its ruling so that discretionary review in the Florida Supreme Court can be sought.

STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court.

Fleming v. Fleming, 408 So.2d 240 (Fla. 4th DCA 1982); Baker v. Baker, 394 So.2d 465 (Fla. 4th DCA 1981).

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing has been furnished, by mail, to JAMES O. MURPHY, ESQUIRE, English, McCaughan & O'Bryan, Attorneys for the Appellee, P. O. Box 14098, Fort Lauderdale, Florida 33302, this 23 day of September 1982.

MCCUNE, HIAASEN, CRUM, FERRIS & GARDNER, P.A. Attorneys for Appellant, MUSICO Post Office Box 14636 Fort Lauderdale, Florida 33302 (305) 462-2000

By /s/ John R. Hargrove JOHN R. HARGROVE

APPENDIX E Denial of Petition for Rehearing

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

Case No. 81-1410

Amalia Musico, Appellant/Cross-Appellee,

V.

Francis G. Musico, Jr., etc., Appellee/Cross-Appellant.

December 10, 1982

BY ORDER OF THE COURT:

ORDERED that Appellant's September 23, 1982 Motion for Rehearing or Clarification is denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath CLYDE L. HEATH Clerk

cc: John R. Hargrove, Esq. James O. Murphy, Esq.

APPENDIX F

Prenuptial Agreement

PRENUPTIAL AGREEMENT

AGREEMENT made in the City of New York, state of New York, this 2nd day of December, 1966, between FRANCIS G. MUSICO, residing at 428 Roosevelt Avenue, in the City of Freeport, State of New York and AMALIA HORACEK, residing at 1850 South Ocean Boulevard, in the City of Fort Lauderdale, State of Florida.

WITNESSETH:

WHEREAS, the parties hereto have known each other for a period of time, and desire to marry, providing each waives the right of election to take against any Last Will and Testament of the other; and

WHEREAS, each of the parties represents that his or her attorney, as the case may be, has privately, and without the other being present, read and explained to such party the provisions of Section 18 of the Decedent Estate Law of the State of New York, wherein it is provided, among other things, that in the event a testator dies after August 31, 1930, and leaves a Will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in said section; and

WHEREAS, each of the parties further represents that his or her attorney, as the case may be, has privately, and without the other being present, read and explained to such party the provisions of Section 83 of the Decedent Estate Law of the State of New York, wherein, among other things, is set forth the manner of distributing a

decedent's property, if not devised or bequeathed, and more particularly as the same relates to a surviving spouse; and

WHEREAS, Francis G. Musico is the owner of real estate in the State of New York and in the State of Florida, having an estimated value of \$100,000.00 and the owner of shares of stock in various corporations which own, operate, manage and control 70 taxicabs in the City of New York and such shares of stock have an estimated value of \$750,000.00; and

WHEREAS, Francis G. Musico has other assets in addition to the above, of approximately \$50,000.00; and

WHEREAS, each of the parties hereto recognizes that in the event of the death of the other and providing they shall first marry, the survivor may be entitled to share in such decedent's estate in an amount ranging from one-third of the estate to the entire estate depending upon what other distributees survive such decedent; and

WHEREAS, as a condition of marrying, the parties desire to enter into an agreement before marriage, waiving the right of election to take against any Last Will and Testament of the other whatsoever; and

WHEREAS, the parties desire by this agreement to mutually restrict the rights which each might otherwise have to take against the terms of the other's will, as such rights are set forth in the Decedent Estate Law of the State of New York, Section 18; and

WHEREAS, each desires to preserve his or her own right to dispose of his or her estate by will as though no marriage had ever taken place; and

WHEREAS, each party expressly desires to retain the power to have his or her estate vest in his or her legatees or devisees as may be prescribed by his, or her, Last Will and Testament; and WHEREAS, each party desires to voluntarily and irrevocably waive, renounce, and surrender, all right, title, and interest, legal or otherwise, choate or inchoate, which each may have in any estate, real or personal, of the other, of which each might die seized, not only in respect of such property which each now owns, but also in respect of such property which each may hereafter acquire,

NOW, THEREFORE, in consideration of the mutual promises and agreements herein contained, it is agreed:

- 1. That the parties hereto shall become husband and wife.
- 2. That in addition to the mutual promises herein contained, and in further consideration of the contemplated marriage and the benefits thereby conferred upon the parties and the obligations thereby assumed, each of the parties hereto does waive the right of election to take against any Last Will and Testament of the other whatsoever.
- 3. That neither party shall have, or acquire any right, title, or claim in and to the real or personal estate of the other, and that each party hereto shall have the right to dispose of his or her property by Last Will and Testament or otherwise, as such party sees fit, free from any claim, domination, or cause of action of or arising in favor of the other party hereto, and that the estate of each party hereto, whether real or personal shall descend to or vest and belong to the person or persons, legatees or devisees, as prescribed in the Last Will and Testament of either, or as provided by the laws of the State of New York, as though no marriage had ever taken place between the said parties.
- 4. That upon the death of a party to this agreement, the other party does hereby agree to elect, forfeit, forego, and waive any statutory or intestate interest, or other right or interest, which would otherwise be conferred on or vested in him or her with respect to any property, real

or personal, now owned or hereafter acquired by the other party, and hereby does release the decedent and his or her estate from any and all intestate interest or distributive share which the survivor might otherwise become entitled to receive upon the death of the decedent; and each party hereto covenants and agrees that he or she, as the case may be, will permit any Will of the other party hereto to be probated and/or allow Letters of Administration to issue on the estate and effects of the other party hereto, with the same force and effect as if such party had predeceased the party who actually shall predecease the survivor of them.

- 5. That each party, hereto, insofar as the estate of the other party is concerned, does hereby waive any and all rights accruing under any section of the Decedent Estate Law of the State of New York, or that may hereafter accrue under such Decedent Estate Law or under any other law of the State of New York or under any law of any other State, Territory, or Possession of the United States of America, or under any law of any foreign nation, and does particularly, but without limitation, waive any and all rights, which have accrued or which may hereafter accrue to either party hereto, by reason of Section 18 of the said Decedent Estate Law of the State of New York, or by reason of any amendment thereto or extension thereof; and each party hereto does hereby specifically waive any and all rights of claims or election that such party may at any time have to take any share of the estate of the other party hereto under any law or under any circumstances whatsoever, with the same force and effect as though there had never been a marriage, one to the other.
- 6. That this waiver of the right to elect to take as against any Last Will or Testament herein contemplated shall apply to any Last Will or Testament hereafter made by the other party, and to present or after acquired property.

- 7. That this agreement shall be deemed to be made under, and shall be governed by the Laws of the State of New York in all respects.
- 8. That each of the parties hereto acknowledge receipt of a signed original or of a signed duplicate original of this agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first above written.

/s/ Francis G. Musico /s/ Amalia Horacek

/s/ Witnessed by Nathan Dinkes

APPENDIX G

Florida Constitution and Appellate Rules

Fla. Const. art. V, § 3(b)

- (b) JURISDICTION.—The supreme court:
- (1) Shall hear appeals from final judgments of trial courts imposing the death penaity and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.
- (2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.
- (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.
- (4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.
- (5) May review any order of judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

- (6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.
- (7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.
- (8) May issue writs of mandamus and quo warranto to state officers and state agencies.
- (9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

Fla.R.App.P. 9.030. Jurisdiction of Courts

- (a) Jurisdiction of Supreme Court.
 - (1) Appeal Jurisdiction.
 - (A) The Supreme Court shall review, by appeal:
 - (i) final orders of courts imposing sentences of death;
 - (ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.
 - (B) When provided by general law, the Supreme Court shall review:
 - (i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;
 - (ii) action of statewide agencies relating to rates or service of utilities providing electric, gas or telephone service.

- (2) Discretionary Jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:
 - (A) decisions of district courts of appeal that:
 - (i) expressly declare valid a state statute;
 - (ii) expressly construe a provision of the state or federal constitution;
 - (iii) expressly affect a class of constitutional or state officers;
 - (iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;
 - (v) pass upon a question certified to be of great public importance;
 - (vi) are certified to be in direct conflict with decisions of other district courts of appeal;
 - (B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the Supreme Court, and:
 - (i) to be of great public importance, or
 - (ii) to have a great effect on the proper administration of justice;
 - (C) questions of law certified by the Supreme Court of the United States or a United States Court of Appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.

Office-Supreme Court, U.S. F I L E D

APR 25 1983

IN THE

ALEXANDER L. STEVAS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1982

AMALIA MUSICO,

Petitioner,

v.

Francis G. Musico, Jr., individually and as Personal Representative of the Estate of Francis G. Musico, Deceased, Respondent.

On Writ of Certiorari to the District Court of Appeal, Fourth District, Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES O. MURPHY, JR.* and DOUGLAS K. SILVIS * ENGLISH, McCAUGHAN & O'BRYAN 524 South Andrews Avenue Post Office Box 14098 Fort Lauderdale, Florida 33302-4098 Telephone: (305) 462-3301

Attorneys for Respondent, Francis G. Musico, Jr., Individually and as Personal Representative of the Estate of Francis G. Musico, Deceased.

* Both Counsel of Record

QUESTIONS PRESENTED

- 1. Whether certiorari should be denied because the Florida trial and appellate courts in good faith considered and construed New York law and did not deny full faith and credit?
- 2. Whether certiorari should be denied because the federal constitutional question was not timely or adequately raised in the Florida courts?

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Bailey v. Anderson, 326 U.S. 203 (1945)	
Banholzer v. New York Life Insurance Company 178 U.S. 402 (1900)	
Beck v. Washington, 369 U.S. 541 (1962)	
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Finney v, Guy, 189 U.S. 335 (1903)	
Glenn v. Garth, 147 U.S. 360 (1893)	
Granados v. Miller, 369 So.2d 358 (Fla. 4th DCA	
Great Northern Railway Co. v. Sunburst Oil and	i
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Hanson v. Denckla, 357 U.S. 235 (1958)	
Herndon v. State of Georgia, 295 U.S. 441 (1935).	
In re: Kucera's Estate, 73 Misc.2d 456, 342 N.Y.S	
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In re: Rubin's Estate, 48 Misc.2d 539, 265 N.Y.S	
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In re: Warren's Estate, 16 A.D.2d 505, 229 N.Y.S	
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TABLE OF AUTHORITIES-Continued Page Johnson v. New York Life Insurance Company, 187 U.S. 491 (1903) ... Lloyd v. Matthews, 155 U.S. 222 (1894) Louisville & Nashville Railroad Company v. Melton, 218 U.S. 36 (1910) 7, 12 Marino v. State of Florida, 392 So.2d 36 (Fla. 2d DCA 1980) 11 Matthews v. State of Florida, 363 So.2d 1066 (Fla. 1978) 11 Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining and Milling Co., 243 U.S. 93 (1917) Radio Station WOW, Inc. v. Homer H. Johnson, 326 U.S. 120 (1944) 10 Sanford v. Rubin, 237 So.2d 134 (Fla. 1970) 11, 12 Smithsonian Institution v. St. John, Executor of Wallace C. Andrews, Deceased, 214 U.S. 19 (1909) 8 State of Florida ex rel. Florida State Board of Nursing v. Santora, 362 So.2d 116 (Fla. 1st. DCA 1978) 11 Stembridge v. State of Georgia, 343 U.S. 541 10 (1952) CONSTITUTION U.S. Const., Art IV, § 1 3, 9 STATUTES Act of September 24, 1789, c.20, § 25 1 Stat. 73, New York Real Property Law § 292 9 OTHER AUTHORITIES 16 Wright, Miller, et al., Federal Practice and Procedure § 4006 (1977)

In The Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1501

AMALIA MUSICO,

v.

Petitioner,

FRANCIS G. MUSICO, JR., individually and as Personal Representative of the Estate of Francis G. Musico, Deceased, Respondent.

On Writ of Certiorari to the District Court of Appeal, Fourth District, Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent FRANCIS G. MUSICO, JR., Individually and as Personal Representative of the Estate of Francis G. Musico, Deceased, respectfully requests that the Petition for Writ of Certiorari to review the judgment and opinion of the District Court of Appeal of the State of Florida, Fourth District, entered September 8, 1982, with rehearing denied December 10, 1982, be denied.

JURISDICTION

Respondent submits that Petitioner is not entitled to certiorari jurisdiction under 28 U.S.C. § 1257(3) because there was no denial of full faith and credit and, even if there were, the issue was not timely or adequately raised in the courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner accurately quoted provisions of the United States Constitution and applicable New York Statutes. (Pet., p. 2-3)

STATEMENT OF THE CASE

The Statement of the Case contained in pages 3-5 of the Petition for Certiorari is generally accurate. However, several additions and clarifications are required.

The trial court specifically found that the Prenuptial Agreement was executed in accordance with the formalities of New York law because Attorney Dinkes was "an original subscribing witness" who properly added his sworn acknowledgement to prove the execution of the instrument after the death of one of the parties. (Pet. App. B, para. 6) The judgment did not indicate that Dinkes "supervised" the signing. It did find that Petitioner entered into the agreement "knowingly; that there was no duress; and that Petitioner's complaints about the agreement during marriage seem to fortify the conclusion that she understood the provisions of the agreement when she executed it." (Pet. App. B, para. 3) It was recognized under New York Real Property Law § 292 (Pet., p. 3) that although the agreement was properly executed and witnessed, it had to be either "acknowledged" by the person who executed it or "proved" under oath by an original subscribing witness. (Pet. App. B. para, 6) Mr. Dinkes' proof was received by the trial court in the form of an Affidavit attached to Respondent's "Response to Petition for Determination of Pretermitted Spouse Status." (Resp. App. A, p. 3a)

The authenticity of Dinkes' Affidavit was not made an issue at trial. However, Petitioner, citing certain New York cases, unsuccessfully argued that the trial court should not accept the Affidavit because it was executed after the death of Francis G. Musico. The trial court

distinguished Petitioner's New York cases and relied on New York cases offered by Respondent in finding that the formal acknowledgment by an original subscribing witness was proper proof under New York law in a situation involving a prenuptial agreement. (Pet. App. B. para. 1 and 6; Pet. App. C. para, 1) The Florida District Court of Appeal agreed, citing the same New York cases referenced in the trial court's opinion, and found that Petitioner's "allegations of procedural irregularities in the execution of the agreement are without merit." (Pet. App. A. p. 2a) This statement paralleled and affirmed the opinion of the trial court which had recited that "Petitioner's claim that the law of New York was not complied with as to technical requirements relative to a subscribing witness is without merit" (Pet. App. B, para, 6) Clearly, both courts found that the procedure used to execute, witness, and later formally prove the prenuptial agreement did not violate New York law. Nothing in the District Court of Appeal opinion indicated that the Florida court categorized New York law regarding formalities of execution as "procedural" to distinguish it from that which is "substantive" or that it sought to evade giving full faith and credit to New York law.

REASONS FOR DENYING THE WRIT

I. FLORIDA'S JUDICIAL CONSTRUCTION OF NEW YORK LAW, WITHOUT QUESTIONING ITS VALIDITY, DID NOT DENY FULL FAITH AND CREDIT.

At page 6 of her brief, Petitioner argued that the applicable New York law was "misconstrued" by the Florida courts and that this misconstruction or "misapplication" amounted to a denial of the "full faith and credit . . . to the public acts, records, and judicial proceedings" of the State of New York, required by Section 1, Article IV, of the Constitution of the United States.

Misconstruction would not provide sufficient grounds upon which to rest jurisdiction of this Court. The mere

construction by the highest court of one state of a statute of another state, without questioning its validity, does not deny the full faith and credit required by the United States Constitution. Glenn v. Garth, 147 U.S. 360, 368-369 (1893) and its progeny.

A. The Florida Courts Correctly Construed New York Statutes and Cases In Allowing An Original, Non-Party Subscribing Witness To Attest To And "Prove" The Execution Of A Prenuptial Agreement After The Death Of A Subscribing Party.

Petitioner argues that a favorable construction of the New York statute was mandated and that the Florida decision for Respondent denied full faith and credit. However, a plain reading of the statutes quoted at pages 2 and 3 of Petitioner's Brief reflects no prohibition against proof of a document's execution through an original subscribing witness after the death of a party. It was incumbent upon the courts of Florida, after receiv-

¹ Cases following Glenn v. Garth include Lloyd v. Matthews, 155 U.S. 222, 227 (1894) Banholzer v. New York Life Insurance Company, 178 U.S. 402, 406 (1900); Johnson v. New York Life Insurance Company, 187 U.S. 491, 495-496 (1903); Finney v. Guy, 189 U.S. 335, 340 and 344 (1903); Allen v. Alleghany Company, 196 U.S. 458, 463 (1905). The manner in which the statute is construed does not raise a federal question. See Johnson, supra at 496; Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917). These early "writ of error" cases remain applicable in testing certiorari jurisdiction under the Full Faith and Credit Clause. Although Section 25 of the First Judiciary Act of September 24, 1789, c.20, 1 Stat. 73, 85-87 was amended several times and ultimately replaced by the current 28 U.S.C. § 1257, the language was not greatly altered and "it was not intended to effect any change in the prior jurisdiction." 16 Wright, Miller, et al., Federal Practice and Procedure § 4006, p. 546, footnote 11 and accompanying text. (West Publishing Co. 1977) An intermediate version of the statutes, stating that certiorari would provide the same power and authority and would have like effect to a writ of error, was ultimately deleted as unnecessary.

ing in evidence the New York statutes and case law in question, to determine their effect. "While statutes and decisions of other states are facts to be proved, . . . when proved, their construction and meaning are for the consideration and judgment of the courts in which they have been proved." Eastern Building and Loan Association v. Williamson, 189 U.S. 122, 126 (1903).

The Petitioner had cited the New York cases she thought to be controlling and the trial court had considered and distinguished them in the first numbered paragraph of its Order Denying Petitioners' Motion for Summary Judgment and Judgment on Pleadings. (Pet. App. C, para. 1) The pertinent comments of that order were adopted by reference in paragraph 1 and the distinction was further reiterated in paragraph 6 of the Judgment now appealed. (Pet. App. B, para. 1 and 6) Both the trial court and the District Court of Appeal relied upon the applicability of two New York cases constru-

² Petitioner's cases were actually distinguishable on two (2) separate bases:

⁽¹⁾ Unlike Maul and Stegman (the New York cases relied upon by the Florida courts below and fully cited in text, infra), In re: Warren's Estate, 16 A.D.2d 505, 229 N.Y.S.2d 1004, aff'd, 236 N.Y.S.2d 628, 187 N.E.2d 478, 12 N.Y.2d 854 (1962) (hereinafter Warren), and the other cases cited by Petitioner involved situations where there had been NO subscribing witnesses at all. Where there had been no non-party witness who could be asked to "prove" the document, the New York courts decided a surviving spoud could not be made to witness against himself or herself. Warren, supra. Rather than overrule Maul, Warren pointedly distinguished the case on this basis, and later New York decisions have continued to cite and either follow or distinguish Maul on its facts. In the case sub judice, there was a subscribing witness. Thus, Maul remained applicable, and Warren was distinguishable.

⁽²⁾ The New York cases Petitioner relied upon dealt with separation agreements rather than prenuptial agreements and it is logical to infer that public policy in New York would distinguish between a spouse's postnuptial waiver of earned rights and a prenuptial waiver made in conjunction with or in contemplation of marriage.

ing the New York statutes favorably to Respondent. In re: Stegman's Estate, 42 Misc.2d 273, 247 N.Y.S.2d 727 (1964) relying on In re: Maul's Will, 176 Misc. 170, 26 N.Y.S.2d 847, aff'd, 262 A.D. 941, 29 N.Y.S.2d 429, aff'd, 287 N.Y. 694, 39 N.E.2d 301 (1942). (Pet. App. C, para. 1 and Pet. App. A, p. 22) In Maul, New York's highest court had affirmed a decision construing New York statutes to permit an original subscribing witness to add a formal acknowledgement after the death of a party. Maul has been distingiushed on facts not applicable to the case at bar, but it remains good law and it was properly relied upon by the Florida trial and appellate courts.³

Matter of Maul's Will is distinguishable from the instant case. There the instrument was subscribed by two witnesses at the time of its execution, and it was one of the subscribing witnesses, not the surviving spouse, whom the Surrogate required to furnish the acknowledgement.

In re: Warren's Estate, 16 A.D.2d 505, 229 N.Y.S.2d 1004, 1007 (1962) (R.App. 10) (Emphasis Supplied).

Clearly, while Maul has been distinguished, it has not been overruled. It remains good law applicable to the case at bar. Long after the Warren decision, it continues to be cited and followed in subscribing witness cases. See In re: Stegman's Estate, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (1964); In re: Rubin's Estate, 48 Misc. 2d 539, 265 N.Y.S.2d 407, 412 (1965); In re: Palmeri's Estate, 75 Misc.2d 639 at 643, 348 N.Y.S.2d 711 (1973). Maul was distinguished in In re: Kucera's Estate, 73 Misc.2d 456, 457-458, 342 N.Y.S.2d 812, 814 (1973) as follows: "While it is true that in Matter of Maul, (supra) the instrument was not acknowledged

In Maul, the New York Court of Appeals clearly showed its approval of an acknowledgement and proof being offered by a subscribing witness after the death of a party. In Warren, the sole case relied upon by Petitioner in her Petition for Rehearing to show denial of full faith and credit (Pet. App. D. para. 3), the New York court had the opportunity to overrule its decision in Maul, but did not do so. Instead, in its affirmance, New York's highest court recognized the distinctions and pointedly referred to the fact that "the separation agreement was not acknowledged by either [spouse] or subscribed by any witness." Warren, supra, 236 N.Y.S.2d at 628 (emphasis supplied). The Appellate Division's decision had already gone out of its way to distinguish Maul stating:

Clearly, the ruling by the Florida District Court of Appeal constituted a "construction" of the New York law, but not a "denial" of its validity; and as evidenced from its opinion, the District Court meant to follow, not disregard or oppose, the decisions of the New York courts. The general rule is that if a settled construction by a court of last resort of the state enacting a statute is relied upon to control the judgment of the court of another state in interpreting the statute, such settled construction must be pleaded and proved. Louisville & Nashville Railroad Company v. Melton, 218 U.S. 36, 51-52 (1910) citing Eastern Building and Loan Association v. Ebaugh. 185 U.S. 114, 121-122 (1902). See also Chicago, Indianapolis & Louisville Railway Company v. Hackett, 228 U.S. 559, 565 (1913). In the case at bar, Petitioner did not plead and was unable to prove a settled construction in her favor; 4 for the reasons detailed in footnotes 2 and 3 to this brief, the New York decisions actually supported the Florida courts' interpretation. In any event, they had a right to exercise their independent judgment in interpreting the New York statutes as they did. Louisville and Nashville Railroad Co. v. Melton, supra at 52.

Petitioner attempted to give a meaning to the statutes and decisions of the state courts of New York which she thought to be correct; however, the duty remained with

before a notary public or any other officer authorized to take an acknowledgment of a deed, it was nonetheless witnessed. Such is not the case here." In New York, a prenuptial agreement must have been witnessed by one other than the principal parties prior to the death of one of them but an original subscribing witness can add his subsequent acknowledgment after decedent's death and the antenuptial waiver remains valid against the surviving spouse.

⁴ Petitioner never pled that there was a settled construction. Merely putting into evidence opinions of the highest court of a state which construed an applicable statute is not the equivalent of specially setting up and proving a settled construction of the law. Chicago, Indianapolis & Louisville Railway Co. v. Hackett, supra at 565.

the forum court to apply those statutes and decisions to the particular facts and to determine from those statutes and decisions what was in truth the law of the foreign jurisdiction. See Finney v. Guy, 189 U.S. 335, 343-344 (1903). The Florida courts did not deny full faith and credit by construing New York law in favor of Respondent.

B. Even If Erroneous, Florida's Construction Of The New York Laws In A Manner Favoring Respondent Did Not Deny Full Faith and Credit.

Even if the Florida courts could be shown to have erred in their construction and application of the New York statutes, a mere error in construction by a state court in an effort to construe the laws of another state is not a denial of full faith and credit, and it would not entitle the Petitioner to invoke the jurisdiction of this Court. Pennsylvania Fire Insurance Company of Philadelphia v. Gold Issue Mining and Milling Company, 243 U.S. 93, 96 (1917); Smithsonian Institution v. St. John, Executor of Wallace C. Andrews, Deceased, 214 U.S. 19. 33 (1909); Johnson v. New York Life Ins. Co., 187 U.S. 491, 496 (1903); Banholzer v. New York Life Ins. Co., 178 U.S. 402, 408 (1900). As Mr. Justice Fuller noted in his opinion denying jurisdiction to review New York's construction of Virginia laws in Glenn v. Garth, 147 U.S. 360, 368 (1893):

If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes of Virginia. If every time the courts of a State put a construction upon the statutes of another State, this Court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit

to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated.

As Mr. Justice Holmes later added in Pennsylvania Fire Ins. Co. of Philadelphia, supra at 96-97: Where there is nothing to suggest one state was not "candidly construing" a foreign state's statutes "to the best of its ability," even if it were wrong, "something more than an error of construction is necessary" in order to entitle a party to come to the United States Supreme Court under Article IV, § 1 (citing Johnson v. New York Life Ins. Co., 187 U.S. 491, 496 (1903); other citations omitted). The Florida trial and appellate courts candidly and logically construed the New York laws to the best of their ability. They did not deny full faith and credit. For this reason, certiorari in this case should properly be denied.

II. THE FULL FAITH AND CREDIT QUESTION WAS NOT TIMELY OR ADEQUATELY RAISED IN STATE COURT.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257(3) that the claimed denial of the constitutional right to full faith and credit have been properly raised in the state court proceedings.

This Court should decline to exercise jurisdiction, since the order from the state appellate court denying the petition for rehearing (where the full faith and credit issue was raised for the first time), did not expressly consider or dispose of the constitutional question. (Pet. App. E.) This Court has previously recognized that where full faith and credit was first raised on a motion for rehearing before the highest Florida court and the motion was denied without opinion on the issue, it "need not determine whether Florida was bound to give full faith and credit . . . since the issue was not seasonably presented to the Florida court." Hanson v. Denckla, 357 U.S. 235, 243-

244 (1958) citing Radio Station WOW, Inc. v. Homer H. Johnson, 326 U.S. 120, 128 (1944). The rule here is the same.⁵ Certiorari should be refused.

A. Petitioner Failed To Plead The Full Faith And Credit Issue As Required By Florida Law.

For purposes of certiorari under 28 U.S.C. § 1257(3), the constitutional title, right, privilege, or immunity must have been "specially set up or claimed." In determining whether the constitutional question was "specially set up or claimed" within the meaning of § 1257 (3), Mr. Justice Harlan noted in his dissent to Amalgamated Food Employees Union Local 590, et al. v. Logan Valley Plaza, Inc., et al., 391 U.S. 308, 334 (1968), that "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues."

It is imperative that the federal question be raised at the proper point in the state court proceedings. Beck v. Washington, 369 U.S. 541, 549-552 (1962). Petitioner

⁵ See Bailey v. Anderson, 326 U.S. 203, 205-207 (1945), holding that where the Virginia Supreme Court of Appeal refused a writ of error without comment on a constitutional issue being raised for the first time on appeal, the failure to comment did not preserve the issue for further consideration and the U.S. Supreme Court was without jurisdiction.

⁶ This Court should deny the petition for writ of certiorari on the assumption that the refusal of the state court to grant a rehearing or certification was based upon the adequate state ground that the constitutional issue was not timely raised in the trial court, as required by state law. Radio Station WOW, Inc. v. Homer H. Johnson, 326 U.S. 120, 129 (1944). The Supreme Court is without jurisdiction "when the question of the existence of an adequate state ground is debatable." Stembridge v. State of Georgia, 343 U.S. 541, 547-548 (1952).

⁷The Beck decision, in holding that an equal protection argument was not timely raised, suggested that in a state requiring constitutional questions to be raised before the trial court, it was not even enough to discuss the interpretation of a statute at the

admitted at page 6 of her brief that she never raised the full faith and credit clause issue at the trial level or even on appeal until her Petition for Rehearing. (Pet., p. 6) Yet, Florida requires that constitutional issues other than those rising to the level of fundamental error be raised before the trial court. Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970); Marino v. State of Florida, 392 So.2d 36, 37 (Fla. 2d DCA 1980); Durcan v. State of Florida, 383 So.2d 248, 249-250 (Fla. 3d DCA 1980); Granados v. Miller, 369 So.2d 358, 360 (Fla. 4th DCA 1979). Ordinarily, "it is a well settled principle of law [in Florida] that one who seeks a constitutional remedy. whether a right or an exemption, has the duty of clearly and positively presenting the issue at the pleading stage." State of Florida ex rel. Florida State Board of Nursing v. Santora, 362 So.2d 116, 117 (Fla. 1st DCA 1978). Clearly, Petitioner failed to raise the full faith and credit issue in her pleadings as she did not do so in the trial court at all.9 Her failure is jurisdictional. The

trial level. Rather, it should there have been argued "that a restrictive interpretation would be unconstitutional" in order to "suggest that constitutional considerations might compel a different result." *Id.* at 550 and 552, respectively.

⁸ It is possible for an intermediate appellate court in Florida to take cognizance of a constitutional issue first raised on appeal and thereby preserve the right of the Florida Supreme Court to decide the issue, but the procedure appears to be limited to the situation where, unlike here, the Florida District Court of Appeal embraces and enters its ruling in favor of the party asserting such constitutional issue. Matthews v. State, 363 So.2d 1066, 1067-1068 (Fla. 1978). This Court might have had jurisdiction if "the constitutional question, however tardily raised, [had been] considered and decided" by the Florida appellate court, but it was not. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932). See Herndon v. State of Georgia, 295 U.S. 441, 443 (1935).

⁹ When the full faith and credit issue was mentioned for the first time in Petitioner's Motion for Rehearing or Clarification to the District Court of Appeal, it was almost presented in the context of an afterthought and certainly was not "specially set up or claimed." (Pet. App. D, para. 3)

mere citation of decisional law of a foreign state without a formal plea of settled construction is not enough to "specially set up" a full faith and credit issue. See Chicago, Indianapolis & Louisville Railway Co. v. Hackett, 228 U.S. 559, 565 (1913), explaining that:

Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved, and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal. *Id.*, quoting Lousville and Nashville Railroad Co., supra at 52.

B. Petitioner Does Not Qualify For The "Fundamental Error" Exception.

Petitioner cannot come within the fundamental error exception. Since Petitioner's own brief characterizes the Florida courts' alleged error as constituting a "misconstruction" or "misapplication" of a New York statute, Petitioner can show no fundamental error in the proceedings below, fundamental error being defined by the Florida courts as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford, supra at 137. That it found no fundamental error was implicit in the language of the Florida Appellate Court in the order denying rehearing when it characterized Petitioner's allegations of "procedural irregularities in the execution of the agreement" as being "without merit." (Pet. App. A, p. 2a)

The decisions of this Court discussed under Point I above make it clear that mere construction by one state of the law of another cannot rise to the level of fundamental error since it cannot constitute a denial of full faith and credit.

C. Petitioner Does Not Qualify For The "Surprise" Exception.

Petitioner has sought to circumvent her failure to raise the constitutional issue below by claiming "surprise." She suggests in pages 4-6 of her brief that the Florida appellate court's use of the word "procedural" somehow negated the New York cases it cited and indicated that the Florida court had ignored the "substantive" law of New York, thus raising the full faith and credit issue "for the first time." However, she has no basis to claim that the District Court of Appeal came to a "surprising" interpretation of the statutes in question, since the same interpretation had been rendered in the trial court below. Thus, it cannot be said that the petition for rehearing presented the first opportunity for raising the issue.

This Court has determined surprise to be lacking in cases involving much more difficult facts than those presented here. In Herndon v. State of Georgia, 295 U.S. 441, 443 (1935) the majority found an absence of surprise and a lack of jurisdiction despite the dissent of Mr. Justice Cardozo pointing out that in that case "the Supreme Court of Georgia repudiated the [statutory] construction adopted at the trial court and substituted another." Id. at 446. Here, the opposite occurred. The appellate court adopted the trial court's construction. Since Petitioner had failed to prove to the trial court the existence of a "settled" construction of the New York statutes in her favor, the affirming decision of the District Court of Appeal could not have been "unanticipated." Petitioner's strained emphasis on the word "procedural" belies the actual reliance of the Florida court on New York substantive law. (Pet. App. A, p. 2a) Jurisdiction should be found wanting.

CONCLUSION

Far from denying full faith and credit, the Florida courts genuinely considered and applied New York laws, citing in both the trial and appellate courts those New York decisions deemed most applicable. Only when unable to convince the Florida courts to agree with her interpretation of New York law did Petitioner belatedly allude to the constitutional issue in a Motion for Rehearing or Clarification and for Rehearing En Banc of the appellate decision. There was no denial of Full Faith and Credit, but even if there might have been, the issue was not timely raised or preserved. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent, Francis G. Musico, Jr., Individually and as Personal Representative of the Estate of Francis G. Musico, Deceased.

* Both Counsel of Record

RESPONDENT'S APPENDIX

IN THE CIRCUIT COURT FOR THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

PROBATE DIVISION

Case No. 80-0724 CP-02 "J" Reasbeck

IN RE: ESTATE OF FRANCIS G. MUSICO, Deceased.

RESPONSE TO PETITION FOR DETERMINATION OF PRETERMITTED SPOUSE STATUS

Francis G. Musico Jr., individually, and as Personal Representative of the Estate of FRANCIS G. MUSICO, deceased, for his response to the Petition for Determination of Pretermitted Spouse Status, states as follows:

- 1. That he denies each and every allegation of the Petition not specifically admitted herein.
- 2. That the allegations of paragraphs 1, 2, 3 and 5 are admitted.
- 3. That he is without knowledge as to the allegations contained in paragraph 4 of the Petition.
- 4. Answering paragraph 6 of the Petition, he states that the will speaks for itself and denies any allegations inconsistent therewith.

AFFIRMATIVE DEFENSES

1. That the Petitioner, AMALIA MUSICO, entered into a Prenuptial Agreement with FRANCIS G. MUSICO, deceased, prior to their marriage, and said Agreement bars the Petitioner from recovery in this cause. A copy

of the Prenuptial Agreement and subsequent notarization thereof is attached hereto as Exhibit A and incorporated herein by reference.[*]

2. That Florida Statute 732.702 and/or the applicable statutes of the State of New York, bar the Petitioner of recovery herein.

DATED this 20th day of May, 1980.

ENGLISH, McCaughan & O'Brien
Attorneys for Francis G. Musico, Jr.,
individually and as Personal Representative of the Estate of Francis
G. Musico, Deceased
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By: /s/ James O. Murphy, Jr. JAMES O. MURPHY, JR.

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Determination of Pretermitted Spouse Status has been mailed to JAMES D. CAMP, JR., McCune, Hiassen, Crum, Ferris & Gardner, P.A., Attorneys for Petitioner, Post Office Box 14636, Fort Lauderdale, Florida 33302, this 20th day of May, 1980.

/s/ James O. Murphy, Jr. JAMES O. MURPHY, JR.

^[*] Prenuptial agreement attached to original was omitted in printing because it is contained in Appendix 7 of Petition for Writ of Certiorari.

AFFIDAVIT

STATE OF NEW YORK)

COUNTY OF NEW YORK)

NATHAN DINKES, being duly sworn, deposes and says the following:

That he is an attorney admitted to practice law in the State of New York, that he resides at One Hall Court, Great Neck, New York, that he was personally familiar with and knew Francis G. Musico and Amelia Horacek and was present on the 2nd day of December, 1966, at the time that both Francis G. Musico and Amalia Horacek executed the Antenuptial Agreement dated December 2, 1966, and that his signature as subscribing witness appears on the executed document.

/s/ Nathan Dinkes NATHAN DINKES

On this 24th day of April, 1980, before me personally came NATHAN DINKES, to me known and known to me to be the individual described in and who executed the foregoing Affidavit; that he executed the same; and that I compared his signature with that of the subscribing witness to an Antenuptial Agreement dated December 2, 1966, and executed by Francis G. Musico and Amalia Horacek, and was fully satisfied that the two signatures compared were those of the same person.

/s/ V. Roger Rubin
V. Roger Rubin
Notary Public
State of New York
No. 02RU8695460
Qualified in Nassau County
Commission Expires March 30, 1982

ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMALIA MUSICO,

Petitioner,

v.

Francis G. Musico, Jr., individually and as Personal Representative of the Estate of Francis G. Musico, deceased, Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1501

AMALIA MUSICO,

Petitioner.

v.

Francis G. Musico, Jr., individually and as Personal Representative of the Estate of Francis G. Musico, deceased, Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

Respondent misstates the requirement for preserving the right to assert the jurisdiction of the Supreme Court of the United States when a state court has offended the "full faith and credit" clause. Respondent also misstates petitioner's characterization of the asserted denial of full faith and credit by the Florida courts. Finally, respondent misstates controlling New York law, and particularly the holding of *In re Warren's Estate*, 299 N.Y.S.2d 1004 aff'd 236 N.Y.S.2d 628, 187 N.E.2d 478 (N.Y. 1962), that property rights vest as of the date of death, and therefore a failure to acknowledge or prove a marital

contract prior to a spouse's death is not curable after the spouse dies.

For these reasons, petitioner wishes to reply briefly to respondent's argument.

T.

THE CONSTITUTIONAL ISSUE WAS PROPERLY PRESERVED

Respondent claims that petitioner raised the denial of full faith and credit too late and therefore the point has not been properly preserved. He cites as primary authority Hanson v. Denckla, 357 U.S. 235 (1958) then proceeds to misconstrue that case. This Court held in Hanson, that where a party has a prior opportunity to raise a full faith and credit issue in state court proceedings and does not then raise the point, but instead waits and raises it in a motion for rehearing after an adverse ruling, the Supreme Court of the United States may decline to determine the merits of the issue because of the failure to preserve the point in a timely manner. In other words, a denial of full faith and credit must be raised at the time the issue first arises—not later.

v. Denckla. Here petitioner had just one opportunity to raise the denial of full faith and credit and this opportunity arose for the first and only time in the appellate decision now being reviewed. As stated by petitioner in her initial brief, there was no constitutional issue presented to the Florida appellate court because the alleged "misapplication" of New York law by the trial court did not constitute a violation of full faith and credit. It was not until the appellate court on its own initiative dismissed the substantive right of petitioner under New York law as "procedural" that "full faith and credit" became an issue. Therefore, it was at that time that petitioner challenged the adverse ruling on a constitutional basis.

Indeed, this Court has not applied the harsh rule suggested by respondent where the constitutional question arose from an unanticipated act of the state court. See Herndon v. State of Georgia, 295 U.S. 441 (1935); Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932). To the contrary, this Court has permitted review of a constitutional issue even where the state appellate court in denying a petition for rehearing does not even refer to the federal question raised in the petition itself. Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930). Respondent's suggestion that constitutional issues should be preserved before they arise is at best a cynical position.

П.

"MISAPPLICATION" OF NEW YORK LAW NOT IN ISSUE

Respondent misstates petitioner's basis for asserting her full faith and credit argument. For example, at page 6 of her initial brief, petitioner does not argue, or even suggest, that the Florida trial court's "misapplication" or "misconstruction" of New York law is a denial of full faith and credit. Petitioner in fact recognized that the "misapplication" of the law of a sister state does not constitute a denial of full faith and credit. In this case, such misapplication merely formed the basis for her appeal to the Florida appellate court on a question of interpretation. More to the point, it was the characterization of New York law by the Florida appellate court as "procedural", and the refusal to apply such law on that stated basis, which constitutes the denial of full faith and credit. This alone forms the basis of her petition to this Court.

Respondent cites Glenn v. Garth, 147 U.S. 360 (1893), and its progeny, as standing for the "rule" that there is no denial of full faith and credit where the law of a sister state has been misconstrued. However, none of the

cases deals with an assertion of a denial of a substantive right created by a state statute which, in effect, has been made a part of a written contract, such as in the context of John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936), the primary case cited by petitioner.

III.

RESPONDENT MISSTATES NEW YORK LAW

In re Warren's Estate, 299 N.Y.S.2d 1004, aff'd. 236 N.Y.S.2d 628, 187 N.E.2d 478 (1962), is the controlling New York decision on the question of the formalities of execution regarding a waiver of marital rights. The application of Warren to this case falls squarely within the holding of John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936), in that the refusal of the Florida courts to recognize and apply the strict New York requirement as to execution cannot be justified on the ground that such formalities are mere procedural irregularities. Interestingly, Yates is neither cited nor discussed by respondent.

In any event, New York law is clear; in order for a waiver to be effective to bar the election rights of a surviving spouse, it must satisfy the formalities of execution prior to the date of the deceased spouse's death. Not a single appellate level decision rendered since Warren even suggests—much less holds—to the contrary. See Irving Trust Company v. Day, 314 U.S. 556 (1942); see also In re Kucera, 73 Misc.2d 456, 342 N.Y.S.2d 812 (1973) and In re Howland's Will, 284 A.D. 306, 132 N.Y.S.2d 451 (1954) (statute requires acknowledgment during lifetime of spouse and failure to do so voids agreement).

It is surprising that the New York court in *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847, aff'd 29 N.Y.S.2d 429, aff'd, 287 N.Y. 694, 39 N.E.2d 301 (1942), failed to recognize that property rights vest on the date of death. The probable reason is that the point was not

raised, and therefore not considered or decided in *Maul*. However, the courts in *Howland* (decided twelve years after *Maul*), in *Warren* (decided twenty years after *Maul*), in *Held* (decided twenty-five years after *Maul*), and in *Kucera* (decided thirty-one years after *Maul*) saw the point exactly. The ruling has been stated, defined and refined numerous times. Unquestionably *Warren* is the controlling substantive law of New York.

CONCLUSION

Since the required statutory element of proof was never properly satisfied in this case, the Musico agreement is absolutely void, and the Florida appellate court's refusal to regard this element as a "substantive" requirement flies directly in the face of the full faith and credit clause and this Court's decision in John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936). As stated in In re Warren's Estate, the harsh result of voiding such agreements generates an increased respect for the strong public purpose which the strict execution requirements implement. 229 N.Y.S.2d at 1006. The full faith and credit clause requires the Florida courts to give the same effect to the New York statute creating this substantive right as it was shown to receive in New York. As petitioner stated in her initial brief, our population is continuing to migrate to the "sunbelt" area-primarily from New York to Florida-at an alarming pace.1 Second marriages are now commonplace, and marital contracts, controlled and governed by the substantive law of the states of their origin, are proliferating in number. If the forum courts are free to dismiss substantive rights, acquired by the parties, then all hope of relying upon and respect for such rights will necessarily be lost. Petitioner,

¹ In Florida, where the total of those who moved in from other states between 1975 and 1980 was 1.8 million, more than 364,000 of them came from New York . . . Miami Herald, April 4, 1983, at 3A at Col. 1.

therefore, respectfully urges this Court to assume jurisdiction and recognize her substantive right—which the Florida courts failed to do.

Respectfully submitted,

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